judicial review standards. Although *Jacada* included international commerce issues and involved facts far more cogent than those of the instant case, this Court denied *certiorari*. 126 S.Ct. 735, 163 L.Ed. 2d 570 (Nov. 28, 2005). The *Petition* in this case is far less substantial than that of *Jacada*, and *certiorari* should thus be denied herein for far more compelling reasons.

B. The Petition is Entirely Grounded on an Incorrect and Contested Representation of Puerto Rico Law

Apart from the above, PRTC does not apprise this Court of another issue that fatally undermines its request for *certiorari*. The *Petition* is premised on the representation that the language of Clause 4(b) of the contract providing that the contract shall be governed by and interpreted "in accordance with the laws" of Puerto Rico has specialized meaning under Puerto Rico law, requiring *de novo* review of all legal issues underlying the arbitral award. *Petition* at 6, 7, 10-11, 17-21. This is a misstatement of Puerto Rico law. Such a provision is generic choice-of-law language in Puerto Rico, as it is elsewhere.[10]

There is divergent language not found in PRTC's contract that traditionally has been regarded by Puerto Rico courts as allowing for expanded judicial review of an arbitral award. Such language does not concern the choice of the law that will govern the contract or that is to be applied by the arbitrators in their resolution of disputes. Instead, it must be different language expressly designed to limit the way the arbitral controversy is to be settled, and thus to impose a restrictive condition on the award itself. To that effect, Puerto Rico doctrine permits judicial review of the law only where the parties have 'expressly' agreed that the *arbitral controversy must be decided*, or that the *award must be*

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[10] A search in the nationwide legal databases will reveal a multitude of generic choice-of-law clauses with virtually identical language.

rendered, in a manner that is "conformable to law" ("conforme a derecho").[11] See *Opinion, Petition* App. 16; *Labor Relations Bd. of P.R. v. Farm Credit Corp.*, 124 D.P.R. 846, 849, 24 P.R. Offic. Trans. [pending official compilation] (P.R. 1989); *Febus v. MARPE*, 135 D.P.R. 206, 213, 1994 P.R.-Eng. 909,606 (Westlaw) (P.R. 1994).[12]

If there is no explicit contractual language thus limiting the manner in which the arbitral controversy must be settled, Puerto Rico law restricts review of an award to grounds very similar to those set forth in sections 10 and 11 of the FAA. See P.R. Laws Ann., Tit. 32, §3222; P.R. Laws Ann., Tit. 4, Rule 8.20. The relevant distinction is exemplified by *Febus v. MARPE, supra*. In *Febus*, the contract provided that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction [...]." Referring to this "in accordance with applicable law" clause, the Puerto Rico Supreme Court held that "[t]he parties did not stipulate that the decision would conform to law. In these circumstances, we conclude it did not have to conform to law." *Febus*, 135 D.P.R. at 215, 1994 P.R.-Eng. 909,606 at page 4; *See also, Labor Relations Bd. of P.R. v. Farm Credit Corp., supra*, 124 DPR at 849 (1989) (Puerto Rico courts can review an award for legal mistakes

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[11] The Spanish "conforme a derecho" is sometimes translated as "in accordance with the law" or "according to law."

[12] This doctrine limits the decisional power of the arbitrator, because since the parties have agreed that the award must conform to law, 'non-conformance' would exceed the arbitrator's "fixed sphere of action." *Rivera v. Samaritano & Co.*, 108 DPR 604, 609, 8 P.R. Offic. Trans. 640, 644 (P.R. 1979). The doctrine had its onset in *Labor Relations Bd. of P.R. v. N.Y. & P.R. S/S Co.*, 69 DPR 782, 69 PRR 730 (1949), which adopted it from U.S. state court decisions reflected in *Williston on Contracts* (Rev. Ed. 1929). *Id.*, 69 DPR at 801-802. Even the pre-FAA common law doctrine on which it was based demanded terms explicitly requiring the arbitrators to decide according to law. See Wesley Sturges, *A Treatise on Commercial Arbitration and Awards* 793-97 (1930).

only with an "express provision" that the controversy must be settled in accordance with the law.)

All of the Puerto Rico decisions cited in the *Petition* that permitted expanded review involve the explicit language required by Puerto Rico case law. See *Labor Relations Bd. of P.R. v. Administrative Bd. of the Ponce Munic. Pier*, 122 P.R. Offic. Trans. 303, 310 (P.R. 1988) (*Petition* at 18) ("the decision [...] shall be according to law"); *Unión de la Industria Licorera de Ponce v. Destilería Serrallés, Inc.*, 116 P.R. Offic. Trans. 426, 430 (P.R. 1985) (*Petition* at 18) ("the award [...] shall be final and binding [...] as to findings of fact but not as to conclusions of law"); *Rivera v. Samaritano & Co.*, 8 P.R. Offic. Trans. 640, 644 (P.R. 1979) (*Petition* at 19) ("matters [...] to be settled according to law"); *S.I.U. de Puerto Rico v. Otis Elevator Co.*, 105 P.R. Offic. Trans. 1156, 1163 (P.R. 1977) (*Petition* at 19) ("[agreement] expressly provides that the award should be conformable to law.") The *Petition* is therefore premised on an incorrect representation of Puerto Rico law.

PRTC seems to suggest that its proffered interpretation of local law is not only correct, but settled beyond contention. PRTC thus refers to this issue as "a well established principle of the law of Puerto Rico" (*Petition* at 7) and a "longstanding convention in the law of Puerto Rico" (*Petition* at 10). Referring to Clause 4(b) of the contract, it alleges that "[u]nder longstanding jurisprudence of the Supreme Court of Puerto Rico, the inclusion of language like that [...] has been construed to mean that expanded judicial review of arbitral awards is available [...]." (*Petition* at 18). It describes this clause as "a specific choice-of-law provision requiring compliance with Puerto Rico law" (*Petition* at 9), and subjectively represents that "[t]here is no doubt that PRTC expected expanded judicial review if an arbitration became necessary [...]" because such contract language "has traditionally been construed to permit such review."

(*Petition* at 11). Such persistent statements betray the flawed nature of PRTC's argument. If PRTC truly wished to expand judicial review of the award, nothing prevented it from using the express conventional language required by Puerto Rico law, such as "the award shall be conformable to law," or "the controversy shall be decided according to law." The conspicuous exclusion of such language from PRTC's contract of adhesion bespeaks its true intent not to expand judicial review.

Needless to say, the Supreme Court of Puerto Rico has never held that generic choice-of-law language such as contained in Clause 4(b) of PRTC's contract can be deemed a substitute for the express conventional language required by local case law to permit review of the law underlying an arbitral award. To the contrary, the *Febus* decision cited above conclusively supports the opposite view. PRTC therefore would not have been entitled to expanded judicial review of the award under Puerto Rico law even if its contract language had passed federal muster.

Given that generic language such as employed by PRTC has long been deemed insufficient to restrict the powers of the arbitrator or to expand judicial review,[13] PRTC has resorted to the argument that as drafter, it intended the language in the arbitration clause that provides that "[t]he Panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico" to officiate as the generic choice-of-law clause, thus somehow transforming the facially generic choice-of-law clause into an implicit expansion of judicial review. *Petition* at 17.

The above interpretation borders on the unintelligible. More importantly, it boils down to an issue of intent under Puerto Rico law that was not developed in the record. It is also demonstrably specious. While the generic "*Language*

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[13] See *Opinion*, *Petition* at App. 14-15.

and Law" Clause 4(b) stands by itself and would have been operative even absent an arbitration provision, Clause 17.2 is not generic, but specifically directed to the arbitration panel. The former identifies the law that will govern contract interpretation, and the latter identifies the law that will be applied in the resolution of contractual disputes. Neither requires that arbitral decisions conform to legal principles in order to be binding. Moreover, PRTC's reading of these clauses would suggest that the language in the arbitration clause providing that the disputes shall be "finally settled" under the AAA Rules, and that "the findings [of the arbitration award] shall be final and binding for both parties"[14] was specifically intended to function as meaningless surplusage. In this regard, any ambiguities would have been resolved under Puerto Rico law against PRTC as the party who drafted the contract. Article 1240 of the Puerto Rico Civil Code, P.R. Laws Ann., Tit. 31, §3478.

The court of appeals recognized the above, and held:

> "'We need not decide whether as a matter of local law this contract would be construed as providing for review of legal error, for we conclude that the FAA creates a presumption that the more limited FAA standard will govern, and the language here, as a matter of federal law, is insufficient to overcome the presumption."

Opinion, *Petition* at App. 16.

Accordingly, the entire foundation upon which the *Petition* is grounded - the representation that under Puerto Rico law PRTC's contract requires review of the award for legal error - is not only flawed and contested, but unresolved by the decision below. Since PRTC's alleged entitlement to expanded award review under Puerto Rico law is the sole

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[14] Clauses 17.2 (first paragraph) and 17.3, *Petition* at App. 3.

basis for its purported federal right to opt out of the FAA, the questionable nature of its state-law premise renders the federal issue an impossible subject for certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 05-1021

In The Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY MEMORANDUM

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LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Puerto Rico Telephone Company ("PRTC") is a wholly owned subsidiary of Telecomunicaciones de Puerto Rico, Inc. ("TELPRI"). TELPRI is owned by Verizon Communications (52.1%), PRTA Holdings Corp. (28%), Popular Inc. (12.9%), and PRTC's employees (7%). PRTA Holdings Corp. is wholly owned by the government of the Commonwealth of Puerto Rico. In 1987, PRTC was wholly owned by the government of the Commonwealth of Puerto Rico. Respondent U.S. Phone Manufacturing Corporation ("U.S. Phone") is an independent corporate entity. No publicly held company owns 10% or more of the stock of U.S. Phone.

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STATUTES AND REGULATIONS:

Federal Arbitration Act, 9 U.S.C. §§ 1-16

Section 10, 9 U.S.C. § 10 1

Section 11, 9 U.S.C. § 11 1

INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

The contract entered into between Puerto Rico Telephone Company, Inc. ("PRTC") at U.S. Phone Manufacturing Corporation ("U.S. Phone") compelling the arbitration of disputes contains two choice of law clauses. One is a generic application of the law of Puerto Rico which settles any conflicts of law question that might arise. Clause 17.2; App. 3. The second clause (Clause 4(b); App. 16) requiring that: "This Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico," is not merely a redundancy. It is, instead, under Puerto Rico law an accepted and traditional statement, when applied to a contract's arbitration provision, reflecting an agreement that the parties have a right to expanded review of relevant questions of law following an arbitral award. The language also is not unclear, requiring that all the "laws" of Puerto Rico, including arbitration laws, apply to the interpretation and governance of the contract.

The court of appeals denied PRTC's request for enforcement of its rights under Clause 4(b), citing this Court's opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), as authority. The court of appeals believes, apparently, that there is a magic word requirement inherent in the judicial review provisions of sections 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11, that is reinforced by *Mastrobuono*'s rejection of State arbitration law as a source of rights absent some kind of statement in the contract expressly applying the State provisions. Here, the court of appeals denied expanded review because the linguistic test distilled from *Mastrobuono* was not satisfied. The court of appeals surely muddled its analysis of the clauses and

failed to harmonize all of the provisions of the Contract, but in the end, very clearly concluded that *Mastrobuono* broadly preempts state laws allowing a state-law based departure from the FAA's default regime, and is a more powerful force in construing arbitration agreements than the countervailing rule that parties are "at liberty to choose the terms under which they will arbitrate." *Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989).

PRTC seeks this Court's review on the belief that the court of appeals has accorded its contractual intentions in the Contract as a whole insufficient force and has done so by misconstruing and over-reading this Court's holding in *Mastrobuono*. This outcome is driven by confusion and a lack of consistency among the courts of appeals in applying this Court's precedents in the area that has drawn extensive commentary and a call for additional enlightenment. *See Petition For A Writ of Certiorari* at 4, n.1; 16 n.4.

U.S. Phone has filed a brief in opposition to a writ. U.S. Phone does not deny the confusion reflected in the decisions of the courts of appeals or the commentary in the many journal articles. U.S. Phone's opposition to review is based upon two theories. First, they argue that PRTC is seeking review of dictum in the lower court's decision that is not appropriate for review and, indeed, that the First Circuit's decision in that regard was favorable to PRTC and not properly reviewed for that additional reason. Next, U.S. Phone disputes PRTC's contention that the law of Puerto Rico accommodates the conclusion that the language in Clause 4(b) embodies an intent to allow expanded review of the arbitral award. Moreover, according to U.S. Phone, other language in the contract conflicts with PRTC's

interpretation of Clause 4(b) and, therefore, the court below committed no error in defaulting to the FAA rule.

U.S. Phone's opposition misconstrues the First Circuit's holding and incorrectly reports the law of Puerto Rico. It does not advance sound reasons for denying PRTC's petition.

ARGUMENT IN REPLY

1. The holding of the court of appeals that is being challenged here is that local conventions allowing for expanded judicial review are irrelevant or an insufficient clear indication of the intent of the parties, following this Court's decision in *Mastrobuono*. App. 16. Put another way, the import of the court of appeals' decision is that the inclusion of language in a contract expressing a state law-based expectation of judicial review will be given no effect unless it conforms to some unarticulated linguistic standard. At the same time, Clause 4(b) is not merely a generic choice of law provision but is in full harmony with the generic provision and the Contract as a whole in directing courts and arbitrators to both the substantive law and the arbitration law that will "govern" all aspects of the Contract. The court of appeals' holding deprives the parties of the benefit of these provisions and is a product of the uncertainty engendered by *Mastrobuono*. It is worthy of review by this Court.

However imprecise the First Circuit may have been in expressing its opinion does not detract from ultimate consequences of its judgment. Certainly, the court of appeals agreed with PRTC's argument that expanded review is possible under some set of circumstances, App. 10-11, and

it is correct also, that there is a disagreement among the circuits on this point. But the court below went beyond those preliminary inquiries to hold PRTC failed to overcome a presumption against expanded review because its inclusion of the law of Puerto Rico and contractual expectations based upon it fell short of the *Mastrobuono* standard.

PRTC is not asking the Court to review dictum or a question of law on which PRTC prevailed.

2. U.S. Phone's dispute with the status of Puerto Rico law is a linguistic quibble. There is little doubt that a contract including an arbitration clause[1] and a separate requirement that any controversy must "be governed by and interpreted in accordance with the laws" of Puerto Rico, anticipates the possibility of expanded judicial review. U.S. Phone's brief in opposition admits the point although maintaining a theory that certain specific language is a more appropriate translation from the Spanish original Brief in Opposition at 8 n.11.

The fact is, however, that the language in Clause 4(b) of the Contract here is more than sufficient to capture the principle of expanded review and the cases make this very clear. The principal case on point decided by the Supreme Court of Puerto Rico is *Rivera v. Samaritano Co., Inc.*, 8 P.R. Offic. Trans. 640 (P.R. 1979).

Drawing from the tradition of both Spanish and Anglo-American jurisprudence, the Supreme Court of Puerto Rico emphasized the importance of effectuating the will of the

[1] In the contact between PRTC and U.S. Phone, the arbitration clause itself contemplates further judicial proceedings. *See* Clause 17.3 ("The arbitration procedure shall be a condition precedent to any right of legal action.").

parties. The Court concluded that an agreement by the parties to require the arbitration to be conducted "according to law" or "in accordance with law" demonstrated a clear expectation of expanded judicial review on questions of law. *Id.* at 644. The failure to honor this provision "renders the will of the parties ineffective." *Id.* at 644-45.

U.S. Phone's reliance on the outcome in *Febus v. MABRE Constr. Corp.*, 135 D.P.R. 206 (P.R. 1994), neither detracts from PRTC's point nor does it prove U.S. Phone's point. In *Febus*, the Arbitration clause contained additional language relied upon by the Puerto Rico Supreme Court that is not even arguably, included in the contract between PRTC and U.S. Phone. The *Febus* contract provided that the arbitrator's award was "final, unappealable and binding." *Id.* at 3-4. The court construed that language to preclude judicial review of any type, while at the same time, it reaffirmed the general rule that expanded review is expected when the award is "to be in accordance with law." *Id.* at 3-5.[2]

U.S. Phone's demand that different or some inflexibly specific wording is required to invoke the rule of Puerto Rico law is not reflected in any opinion of the Puerto Rico courts, nor is it consistent with the principles of expanded review honored under Puerto Rico law. No case holds, as U.S. Phone suggests, that the expanded review is off the

[2] U.S. Phone emphasizes language in Clause 17.2 that disputes will be "finally settled under FAA rules" and that the findings "should be final and binding for both parties." *See* Brief in Opposition at 11. These provisions do not suggest that Clause 17.3 contemplating expanded judicial review, and Clause 4(b) adopting the Puerto Rico rule are ousted. All provisions may be read harmoniously giving effect to each. And, nothing in Clause 17.2 parallels the language in the *Febus* contract providing that the award was "unappealable."

table unless there is some "explicit" agreement that the award must be "conformable to law." There simply is no magic word requirement under Puerto Rico law and the rule relied upon here by PRTC to demonstrate that it expressly contracted for expanded judicial review of arbitral awards is not subject to credible dispute.

3. The court of appeals effectively construed *Mastrobuono* to mean that there is only one valid way to contract for expanded judicial review or the application of State arbitration law, and that reliance on traditional local law shorthand, even where the contractual language is easily broad enough to reflect the intent of the parties, will not suffice. If the intent of the parties is the controlling factor, the First Circuit's demand for some technical inflexible approach gives unintended force to *Mastrobuono*, is not appropriate, and merits review by this Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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